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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
AT TACOMA

10 TOBIN SATHER,

11 Plaintiff,

12 v.

13 JAMES KEY, THOMAS ORTH,
14 BERNARD E WARNER, LANNIE
GRAY, RAHN DOTY,

15 Defendants.

CASE NO. 3:16-CV-05503-BHS-DWC

REPORT AND RECOMMENDATION

Noting Date: May 12, 2017

16 The District Court referred this action, filed pursuant to 42 U.S.C. § 1983, to United
17 States Magistrate Judge David W. Christel. Presently before the Court is Defendants Washington
18 State Department of Corrections (“DOC”), Dan Pacholke, James Key, Thomas Orth, and Lannie
19 Gray’s Motion for Summary Judgment. Dkt. 19. After review of the Motion, the Court
20 recommends the Motion be denied as moot and Defendants DOC, Pacholke, and John Does be
21 dismissed from this action.

22 In the Motion, Defendants DOC, Pacholke, Key, Orth, and Gray seek dismissal of this
23 action primarily because Plaintiff failed to state a claim upon which relief can be granted. *See*
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1 Dkt. 19. On April 20, 2017, Plaintiff filed the Amended Complaint. Dkt. 29. The Court directed
2 all current Defendants named in the Amended Complaint (James Key, Thomas Orth, Lannie
3 Gray) to file a response. *See* Dkt. 31. The Court also directed service of the Amended Complaint
4 on the newly named Defendants (Bernard Warner and Rahn Doty). *See* Dkt. 30.

5 An amended complaint supersedes the original complaint. *Ferdik v. Bonzelet*, 963 F.2d
6 1258, 1262 (9th Cir. 1992). The original complaint is “treated thereafter as non-existent.” *Loux v.*
7 *Rhay*, 375 F.2d 55, 57 (9th Cir. 1967) *overruled on other grounds by* *Lacey v. Maricopa County*,
8 693 F.3d 896 (9th Cir. 2012). The Motion attacks the Complaint, which is now “non-existent.”
9 *See* Dkt. 19. Further, after review of the Amended Complaint, Plaintiff has included additional
10 facts relating to his claims against Defendants Key and Orth, and has withdrawn his claims
11 against Defendants DOC, Pacholke, and John Does. *See* Dkt. 29. Defendants Key and Orth have
12 therefore been ordered to respond to the Amended Complaint.

13 Accordingly, the undersigned recommends the Motion (Dkt. 19) be denied as moot, but
14 Defendants Key and Orth be allowed to re-file a dispositive motion based on the allegations
15 contained in the Amended Complaint. *See Bacon v. Reyes*, 2013 WL 3893254 (D. Nev. July 26,
16 2013) (denying motion for summary judgment as moot based on the filing of an amended
17 complaint); *Nelson v. City of Los Angeles*, 2015 WL 1931714, *22 (C.D. Cal. Apr. 28, 2015)
18 (recommending summary judgment motions be denied without prejudice to their reassertion after
19 the plaintiff was given leave to amend because the motions for summary judgment were based
20 on the original complaint); *Farkas v. Gedney*, 2014 WL 5782788, *3 (D. Nev. Nov.6, 2014)
21 (“[B]ecause granting [plaintiff’s] motion for leave to amend will alter the scope of defendants’
22 now-filed motion for summary judgment, defendants’ motion for summary judgment is denied
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1 without prejudice, subject to re-filing based on the scope of the soon-to-be amended
2 complaint.”).

3 Additionally, the undersigned recommends Defendants DOC, Pacholke, and John Does
4 be dismissed from this action because they are not named in the Amended Complaint and did
5 plead a counterclaim in this case. *See* Fed. R. Civ. P. 41(a) (once defendant has responded to the
6 complaint, the action may only be dismissed by stipulation of dismissal signed by all parties who
7 have appeared or “by court order, on terms that the court considers proper”).

8 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil
9 Procedure, the parties shall have fourteen (14) days from service of this Report to file written
10 objections. See also Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those
11 objections for purposes of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985). Accommodating the time
12 limit imposed by Rule 72(b), the clerk is directed to set the matter for consideration on May 12,
13 2017, as noted in the caption.

14 Dated this 25th day of April, 2017.

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David W. Christel
United States Magistrate Judge
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